

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



76-7481

To be argued by:  
GRANT W. KELLEHER,

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

YVONNE GOULD, on her own behalf and  
on behalf of all others similarly  
situated,

Plaintiff-Appellant

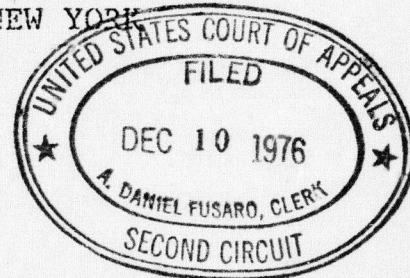
v.

McCUE & McCUE, P.C., ULSTER SAVINGS  
BANK and all other banking organiza-  
tions similarly situated,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 76-7481

YVONNE GOULD, on her own behalf  
and on behalf of all others  
similarly situated,

Plaintiff-Appellant,

v.

McCUE & McCUE, P.C., ULSTER  
SAVINGS BANK and all other  
banking organizations similarly  
situated,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR THE APPELLANT

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This is an appeal from a judgment of the District Court for the Southern District of New York, entered on August 9, 1976, dismissing the case as moot. The memorandum and order of the district court (Whitman Knapp, D.J.) is reported in 417 F.Supp. 998 (August 4, 1976). A copy is annexed hereto.

#### STATUTE INVOLVED

Section 5222 of the New York Civil Practice Law And Rules (McKinney Supp. 1976) authorizes an attorney for a judgment creditor to issue and serve a restraining notice upon a person holding property of a judgment debtor prohibiting him from transferring the property to any person for a period of one year, or until satisfaction of the judgment, whichever is earlier, except upon direction of the sheriff or the court. A copy of the statute is annexed hereto.

#### STATEMENT OF THE ISSUES PRESENTED

This is a class action brought by the appellant, a public assistance recipient, against the appellee law firm and a New York bank to challenge the constitutionality under the due process clause of the 14th Amendment of CPLR §5222 under which a restraining notice was served on the bank by the law firm and appellant's bank account restrained, without notice to her, to satisfy a judgment against her. The questions presented are:

1. Whether the district court erred in holding that the action between appellant and the appellee law firm is moot solely because, after commencement of the action, the restraining notice was voluntarily lifted by the appellee, the court was advised by the appellee that no further steps were contemplated against appellant so long as she was a recipient of public assistance, and appellant has withdrawn her funds from the bank and no longer maintains a bank account for fear that

funds in the account might again be restrained to satisfy the judgment outstanding against her.

2. Whether the district court erred in dismissing the complaint without determining whether there exists a live controversy involving the members of the plaintiff class.

3. Whether the district court should abstain from ruling upon the constitutionality of CPLR §5222 under the due process clause of the 14th Amendment to permit the New York courts to enter a general protective order to require notice to a judgment debtor of service of a restraining notice under §5222 or to pass upon the constitutionality of the statute under the due process provision of the New York Constitution which simply mirrors the due process clause of the 14th Amendment.

#### STATEMENT OF THE CASE

##### The Nature of the Case and the Proceedings Below

This is a class action under the Civil Rights Act (42 U.S.C. §1983) challenging the constitutionality of CPLR §5222, a New York post-judgment garnishment statute which authorizes an attorney for a judgment creditor to issue and serve, as an officer of the court, a restraining notice upon a third person holding property of a judgment debtor. Appellant contends that the statute violates the due process clause of the 14th Amendment to the United States Constitution by permitting restraint of a judgment debtor's property in the hands of a third person without notice to the judgment debtor.

Appellant seeks declaratory and injunctive relief.\*

Appellee McCue & McCue, P.C., appeared in the action, answered the complaint and thereafter moved for judgment on the pleadings. The defendant Ulster Savings Bank never appeared. The district court entered an order dismissing the action as moot. In the same order the court denied, without passing upon their merits, motions of the appellant to convene a three-judge court, to determine whether the action is maintainable as a class action and to permit intervention of another judgment debtor as a named plaintiff.

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\*The question concerning the constitutionality of §5222 under the due process clause is substantial. The statute permits a restraining notice to be served upon a judgment debtor's bank and the funds in his account restrained without notice to the debtor. The general question whether the due process clause requires notice to a judgment debtor of post-judgment garnishment proceedings is unsettled in the Supreme Court. cf. Endicott-Johnson Corporation v. Encyclopedia Press, Inc., 266 U.S. 285 (1924) with Griffin v. Griffin, 327 U.S. 220 (1946) and Hanner v. DeMarcus, 389 U.S. 926 (1967), 390 U.S. 736 (1969); see North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Sheven, 407 U.S. 67 (1972); Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337 (1969). But, see Brown v. Liberty Loan Corporation of Duval, 539 F.2d 1355 (5th Cir. 1976). Since the restraint here was on public assistance funds in appellant's bank account, this case focuses on whether notice to a welfare recipient of a restraint on her bank account is required by the due process clause in the interest of both the state and the judgment debtor to avoid seizure of public assistance funds in violation of New York Social Services Law §137 prohibiting execution and levy on such funds.

### STATEMENT OF FACTS

Appellant, a public assistance recipient, is a judgment debtor by virtue of a default judgment entered against her on December 12, 1975, in a civil action for money damages brought by the Orange County Trust Company in Orange County, New York. On April 8, 1976, the appellee McCue & McCue, P.C., attorneys for the judgment creditor, issued and served pursuant to §5222 a restraining notice on Ulster Savings Bank restraining funds in a checking account of the appellant consisting entirely of money from her public assistance grant. The bank complied with the notice and dishonored a check of appellant payable to her landlord. The restraint upon appellant's checking account was imposed without notice to appellant and without affording her an opportunity for hearing upon the lawfulness of the restraining notice. (Comp. ¶'s 16-18, Doc. 1\*).

The complaint in the case at bar was filed on April 27, 1976, and the defendants were served on April 29th. On the same day on which it was served, and after being advised by an attorney for the Orange County Department of Social

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\*The district court authorized the plaintiff to proceed in forma pauperis (Order, McMahon, D.J., Doc. 2). This appeal is therefore before this Court on the original record without an appendix (Fed. R. App. P. 30(f), 2nd Cir. R. 30).

Services that the appellant was a public assistance recipient, the appellee wrote to the Ulster Savings Bank authorizing the bank to remove the restraint upon appellant's account. Appellee has assured the court below that "McCue & McCue, P.C., has taken no further steps against plaintiff since lifting the restraining notice issued against the plaintiff's bank account, nor are any further steps contemplated while she is a recipient of public assistance." (Motion for Judgment on the Pleadings ¶'s 4, 11, Ex. 6, Doc. 14).

On May 10th the defendant bank permitted appellant to withdraw her funds from her checking account, and she closed her account. Since then appellant has not established a checking account in any bank for fear that the account would be restrained to satisfy the judgment which is outstanding against her. This has made it necessary for appellant to pay her rent and utility bills by money orders instead of by check. (Affid. of Yvonne Gould, ¶'s 5, 6, Doc. 17.)

#### ARGUMENT

##### Summary

There is still a live controversy between the appellant and the appellee attorneys as to whether the appellee law firm may again restrain a bank account of the appellant under CPLR §5222 to satisfy the judgment which is outstanding against her. Appellant has a personal stake in the outcome of this controversy because the threat of imposition of a restraint upon funds in her bank account is deterring her from opening

and maintaining a bank account.

The appellee has failed to show that there is no reasonable expectation that it will not again restrain a bank account of the appellant to satisfy the judgment against her. The voluntary lifting of the restraining notice by the appellee law firm together with its protestation that no further steps against appellant are contemplated so long as she is a recipient of public assistance are entitled to little weight. Nor does appellant's voluntary forbearance from establishing a bank account for the present give assurance that she will not in the future establish an account and again expose her funds to a restraining notice.

The district court erred in dismissing the complaint without passing upon the question whether there is a live controversy involving the members of the plaintiff class consisting of all judgment debtors whose bank accounts are now under restraint. This case meets the collective criteria of the relevant authorities holding that a class action may survive although the action may be moot as to the named parties. The named plaintiff representing the plaintiff class had standing to challenge the constitutionality of §5222 at the time this action was commenced; class action certification was not reasonably possible under the circumstances of this case; the controversy of the plaintiff class, although not with a named defendant, is with the members of the defendant class consisting of all New York banks restraining accounts of the members

of the plaintiff class; and the case presents an issue "capable of repetition, yet evading review" because a restraining notice will probably be lifted or expire before judicial review of the constitutionality of §5222 can be completed.

It is inappropriate for the district court to abstain from passing on the constitutionality of §5222. There is no rational ground for concluding that New York State courts might rule that service of a restraining notice under §5222 must be accompanied by notice to the judgment debtor. Moreover, since the due process provision of New York Constitution mirrors the due process clause of the 14th Amendment, the district court should not defer to the New York State courts to permit them to pass on the constitutionality of §5222 under the state constitution.

#### Point I

#### The District Court Erred In Holding That The Controversy Between Appellant And The Appellee McCue & McCue., P.C., Is Moot

We submit that the district court erred in concluding that the controversy between the appellant and the appellee McCue & McCue, P.C., is moot, first, because there is still a live controversy between appellant and appellee in which appellant continues to have a personal stake, second, because the appellee failed to show that there is no reasonable possibility that the wrong committed against the appellant will not be repeated, and third, because the wrong committed against

appellant "is capable of repetition, yet evading review."

FIRST. The central controversy in this case is whether the appellee, as attorneys for a judgment creditor, may lawfully restrain funds of the appellant on deposit in a bank to satisfy the judgment. Appellee may not lawfully do so if §5222 is unconstitutional. Appellant had standing to challenge the constitutionality of the statute when this action was commenced because she had a "personal stake in the outcome of the controversy": her funds in her checking account with the Ulster Savings Bank were then under restraint and a check of hers had been dishonored. Roe v. Wade, 410 U.S. 113, 124 (1973); Flast v. Cohen, 392 U.S. 83, 99 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

This central controversy between the appellant and the appellee is still very much alive. The judgment against appellant continues unsatisfied, and the question remains unsettled whether the appellee may lawfully invoke §5222 to restrain funds of the appellant in a bank account to satisfy the judgment. Her "personal stake in the outcome of the controversy" is still significant and immediate: appellant is refraining from exercising her right to open a checking account with a bank because of her fear that she may lose funds in the account to her judgment creditor through a restraining notice. The existence of this unresolved dispute is a brooding threat to appellant which, we submit, continues to give her standing to obtain adjudication of the constitutionality of the statute

which is the source of the threat. Motor Coach Employees of America v. State of Missouri, 374 U.S. 74, 77-78 (1963); Moya v. DeBaca, 286 F.Supp. 606, 607 (D.N. Mex. 1968) (three-judge court), app. dismiss. 395 U.S. 825 (1969).

SECOND. The district court held that this action is moot because the appellee voluntarily lifted the restraint upon appellant's bank account, he has disclaimed any intention to take further steps against the appellant so long as she is a public assistance recipient, and appellant no longer has a bank account. It is submitted that these facts are not sufficient to assure that the wrong against the appellant will not be repeated.

The lifting of the restraining notice is not sufficient, for it is nothing more than voluntary cessation by the appellee of its allegedly unlawful conduct. Gray v. Sanders, 372 U.S. 368, 376 (1963); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). This voluntary cessation of the wrong should not moot the case because the appellee would be left "free to return to [its] old ways". W.T. Grant Co., at 632; Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260 (1938).

The disclaimer given by appellee is entitled to little weight. It is equivocal at best: Appellee assured the court below that no "further steps" against appellant are "contemplated" but only while appellant "is a recipient of public assistance" (supra., p. 6 ). Even an unqualified

assurance by appellee that it would never again invoke §5222 against appellant should not be sufficient to moot the case. In W.T. Grant Co., a suit to enjoin interlocking directorates in violation of the Clayton Act, the defendants told the Court that the interlocks no longer existed and disavowed any intention to revive them. The Supreme Court summarily dismissed this disavowal with the observation (at 633) that "[s]uch a profession does not suffice to make a case moot."

The fact that appellant does not for the present have a checking account does not satisfy the "heavy burden" of the appellee to show that "there is no reasonable expectation that the wrong will be repeated". W.T. Grant Co., at 633. There is nothing immutable about the appellant's decision to refrain from using a bank. She may well change her mind and establish a checking account; if she does, appellee is free once again to enforce §5222 against her. Thus, appellant's voluntary termination of her banking privileges is not an event which makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968).

THIRD. The injury resulting from imposition of a restraining notice under §5222 will frequently be a short-lived phenomenon. The restraint is subject to the caprice of the judgment creditor and his lawyer who can lift it at any time for any reason. If a judgment creditor or his attorney

does not wish to expend the time and money required to defend on its merits an action challenging the constitutionality of §5222, the easy course is to follow the one which the appellee pursued here: to lift the restraint and then defend the action, not on its merits, but on the ground that the release has rendered the action moot.

It is also significant that §5222 limits the duration of a restraining notice to one year and that, if the judgment debtor is a welfare recipient, the temporal limitation may be even less. Funds of a public assistance grant in a bank account are exempt from levy and execution under New York law. Social Services §137; Consumer Credit Corp. v. Lewis, 313 N.Y. Supp. 2d 879 (D.C. Nassau County, 1970). If a public assistance recipient in some fashion learns before levy and execution on them that funds from his grant on deposit in a bank have been restrained he has the right to invoke the aid of the Department of Social Services\* and of the courts\*\* to obtain release of the funds. If one or the other comes to

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\*Regulations of the New York Department of Social Services provide (§352.17(4)):

When wages are garnisheed, property income assigned, bank accounts attached, or other cash income is unavailable to the applicant or recipient, such income shall not be applied against need until and unless the agency can secure a release from such restriction.

\*\*CPLR §5240 (McKinney 1963) authorizes the courts to enter protective orders in proceedings for enforcement of a money judgment (infra., p. 22 ).

his assistance because the funds restrained by the bank are exempt from levy and execution, the time-span of a restraining notice may be limited to weeks.

Thus, to condition judicial review of the constitutionality of §5222 upon the actual existence of a restraint of a bank account will frequently frustrate the judicial process. The restraint upon a bank account of any judgment debtor, but particularly an account of a public assistance recipient, may simply not survive for sufficient time to permit complete judicial review. Because of these time factors, this case falls within the line of authorities holding that, although particular misconduct may be ended, a plaintiff is entitled to a decision on the merits of his claim because, in the rubric of the cases, the misconduct "is capable of repetition, yet evading review", Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-127 (1974); Roe v. Wade, *supra.*, at 125; Rosario v. Rockefeller, 410 U.S. 752, 756 fn. 5 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). And this has particular application where the case involved presents a challenge to "governmental action both affecting and continuing to affect the behavior of citizens in our society". Super Tire Engineering Co., at 126.

Point II

The District Court Erred In Dismissing  
The Complaint Without Determining  
Whether There Is A Live Controversy  
Involving The Members Of The Plaintiff  
Class

The complaint in this action names as a plaintiff class judgment debtors whose funds in New York banks are subject to restraining notices issued and served pursuant to §5222. It names as a subclass recipients of public assistance whose funds in New York banks are subject to such restraining notices. Thus, the class action is on behalf of all judgment debtors, and, more specifically, public assistance recipients, whose funds are now under restraint in New York banks.

The district court denied appellant's motion for class action certifications solely "[b]ecause we have determined that the case is moot." 417 F.Supp. at 989. It dismissed the complaint without passing on whether the certification should be granted. It did not decide whether the case, although moot as to the named plaintiff, might be continued on behalf of the other members of the plaintiff class. We submit that this was error.

The Supreme Court has made it clear that under certain circumstances a class action may be maintained on behalf of members of the class, although the action may be moot as to the named parties. In Dunn v. Blumstein, 405 U.S. 330 (1972), a class action in which the plaintiff challenged on his own behalf and on behalf of all Tennessee voters the constitutionality of state durational residency requirements for voting, the

Supreme Court held (at 333, fn. 2) that, although the action had become moot as to the named plaintiff because he had satisfied the residency requirements and could vote by the time of his appeal, he continued to have standing to challenge the residency requirements as a member of the class of people affected by them.

Sosna v. Iowa, 419 U.S. 393 (1975), followed Blumstein and laid down certain criteria which must be met in order for a class action to remain alive after it has become moot as to a named plaintiff. Sosna involved the constitutionality of an Iowa one-year durational residency requirement for a divorce action. The Supreme Court concluded that, had appellant sued only on her own behalf, the case would have become moot because she had satisfied the residency requirement and had obtained a divorce by the time of the appeal. Since, however, the suit was a class action on behalf of all Iowa residents who were barred from instituting divorce actions by reason of the residency requirement, the Supreme Court concluded that the controversy remained alive as to the class and that the constitutional issue should be decided. The Court said (at 401):

Like the other voters in Dunn, new residents of Iowa are aggrieved by an allegedly unconstitutional statute enforced by state officials. We believe that a case such as this in which, as in Dunn, the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of

the controversy as to the named plaintiff.

The Supreme Court has made it clear in Sosna and related cases that a class action should survive whenever (1) the named plaintiff has a live controversy at the time the complaint is filed, and (2) at the time of class action certification, unless the action on his own behalf has become moot before the district court can reasonably be expected to rule on a certification motion, (3) the class represented by the named plaintiff has a live controversy at all stages of the judicial proceeding, and (4) there is a time factor which makes it probable that any single member of the class will find it mooted before litigation has been completed. In the discussion which follows we show that the case at bar meets each of these criteria.

(1) There can be no dispute that the appellant had standing to sue at the time the complaint was filed. Ulster Savings Bank was restraining appellant's bank account pursuant to a restraining notice served by appellee on the bank; it also was refusing to honor one of her checks (supra., p. 5 ).

(2) This case clearly falls within the exception to the general requirement of Sosna (at 402) that a named plaintiff have a live controversy at the time of class action certification. Since the events which allegedly mooted the appellant's case occurred less than two weeks after the complaint was filed, the district court did not have time to certify under Rule 23(c) before the case became moot as to

appellant. The case at bar is, therefore, controlled by the exception defined by the Court in Sosna as follows (at 402, fn. 11):

There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

We demonstrate later "the reality of the claim" that the issue in this case will evade review unless appellant is permitted to continue the action on behalf of the plaintiff class (infra., p. 20 ).

The validity of this exception to the general requirement of Sosna concerning class action certification is not impaired by Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975). That case held (at 130) that the action on behalf of a class did not survive because the class "was never properly certified nor the class properly identified by the district court" as required by Fed. R. Civ. P. 23(c). The case became moot as to the plaintiff only after the appeal had reached the Supreme Court, and there was no question that the district court had ample opportunity, and purported, to rule on a certification motion. Here, in contrast, the district court did not have an opportunity to certify the class before the case

became moot as to the appellant, and the appellant, by filing her class action motion and supporting affidavits (Motion for Class Certification, Doc. 8), has done all that she could to obtain proper certification of the class.

It is also highly significant in this case that the court below not only refused to rule on the merits of appellant's motion for class action certification but also denied, without passing on its merits, her motion for leave to intervene another judgment debtor, also a public assistance recipient (Motion for Leave to Intervene, Doc. 12). At the time the motion for intervention was before the district court the bank account of the applicant for intervention was subject to a §5222 restraining notice (Intervener's Complaint, ¶'s 12, 13, Doc. 12). Had the district court permitted the applicant to intervene and granted the class action motion, this case would now fall within the general rule of Sosna that there be a named plaintiff with a viable controversy at the time a class action is certified.\*

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\*Although this is not a matter of record in this case, we believe we have the obligation to inform this Court that the restraint on the bank account of the applicant for intervention was lifted by consent of the attorney for the judgment creditor on September 9, 1976, over a month after denial by the court below of the motion for leave to intervene. This followed a motion under §5240 on behalf of the applicant for release of her funds on the ground that they were part of her public assistance grant.

(3) The complaint in this case names not only a plaintiff class but also a defendant class consisting of virtually all New York banks. The live controversy which persists here, although the case may be moot as to the named parties, is a controversy concerning the lawfulness of §5222 restraints between the members of the plaintiff class - judgment debtors whose bank accounts are now under restraint - and the members of the defendant class - all New York banks restraining those accounts.

The fact that the controversy is between the two classes rather than, as in Sosna, between the plaintiff class and a named defendant is immaterial. Richardson v. Ramirez, 418 U.S. 24 (1974), squarely holds that, if there is a live controversy between the members of a plaintiff class and those of a defendant class, an action does not become moot because the controversy between the named parties is moot. That case involved a suit by ex-felons to compel clerks of three California counties in which the plaintiffs resided to register them as voters. The plaintiffs sued individually and on behalf of all persons ineligible to vote by reason of conviction of a felony. The clerks were named as defendants individually and as representative of the class of all other county clerks in California with the duty of determining whether ex-felons might vote. After suit was filed the defendant clerks withdrew from the action and permitted the plaintiffs to register (418 U.S. at 36). The Supreme Court concluded (at 40) that

since the action was a class action on behalf of all ex-felons in California against a defendant class of all county clerks, the action did not become moot as to the plaintiff class even though "if the case were limited to the named parties alone, it could be persuasively argued that there was no present dispute on the issue of the right to register \* \* \* ."

(4) Because of the time factors with respect to §5222 restraining notices previously discussed (supra., pp. 11-13), it is unlikely that any member of the plaintiff class or subclass will ever be able to litigate fully the constitutionality of §5222 before a restraining notice on his bank account is lifted. The judgment creditor and his attorney are free to lift the restraining notice at will, and they may be expected to do so if forced to defend the constitutionality of §5222. The statute limits the duration of a restraining notice on funds of any judgment debtor to one year. Because funds from public assistance grants are exempt from levy and execution, the duration of restraining notices on bank accounts of public assistance recipients may be much less. Thus, unless this action is permitted to survive as to the classes, "the issue sought to be litigated" will escape "full appellate review at the behest of any single challenger" Sosna v. Iowa, supra., at 404.

### Point III

#### The District Court Should Not Abstain From Ruling Upon The Constitutionality of CPLR §5222

In its opinion holding that this case is moot the district court noted en passant (417 F.Supp. at 990-991) that, had it determined that the action was not moot, it (or any three-judge court that might be convened) "would most likely have abstained from adjudicating the merits"\*. This is not because §5222 itself might be construed by New York courts to require notice to a judgment debtor of service of a restraining notice. It is plain, and the district court conceded (at 990), that the statute on its face makes no provision for such notice. Since there is no uncertainty in the statute which might be resolved by interpretation by New York State courts in a manner to avoid the necessity for a ruling on its constitutionality, the statute itself does not require abstention. Harman v. Forssenius, 380 U.S. 528 at 534-536 (1965); Zwicker v. Koota, 389 U.S. 391 (1967).

The district court concluded, however, that abstention here would be appropriate either because "the broad discretionary power vested in the court by CPLR §5240 might be construed

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\*It is clear that the court below could not have entered an abstention order. A decision to abstain from review of the constitutionality of a state statute to permit construction of the statute by a state court is for a three-judge federal court and not for the single federal judge to whom application to convene is made. New York State Waterways Association v. Diamond, 469 F.2d 419, 423 (2nd Cir. 1972); Abele v. Markle, 452 F.2d 1121, 1125-26 (2nd Cir. 1971); see, also, Sugar v. Curtis Circulation Company, 377 F.Supp. 1005, 1061 (S.D.N.Y. 1974).

by the New York courts as sufficient to protect §5222 from constitutional objection" or because state courts might "eliminate any federal question by voiding the statute as violative of the state's own due process clause (N.Y.S. Const. Art. 1, §6)". We submit that neither of these affords a rational basis for abstention.

Section 5240 (McKinney 1963) provides for entry of judicial protective orders in the course of the exercise of the procedures set forth in CPLR Article 52 for enforcement of money judgments, including restraining notices. Specifically, it provides that "the court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure".

In concluding that §5240 might be construed in a manner to protect §5222 from constitutional objection, the district court apparently read §5240 as vesting in state courts a rule-making power of a sort which would permit the courts to require notice to the judgment debtor at the time of service of a restraining notice under §5222. Section 5240 clearly does not confer any such general quasi-legislative power on the state courts. Its only purpose is to permit judicial protective action by "an order" to supervise the exercise in specific cases of the various procedures for enforcement of money judgments set forth in Article 52. It is modeled on

CPLR §3103 (McKinney 1970) (CPLR §5240, Practice Commentary) which provides for protective orders in discovery proceedings, a provision which has never been construed to do more than to authorize a court "to make a protective order" in the course of the employment of disclosure devices in specific cases (CPLR §3103, Practice Commentary).

The suggestion that the federal courts should abstain from passing on the constitutionality of §5222 under the due process clause of the 14th Amendment to permit New York courts to consider whether the law violates the due process clause of the New York Constitution is in direct conflict with applicable authority. The due process provisions of Article 1, Section 6 of the State Constitution and the due process clause of the 14th Amendment to the United States Constitution are coextensive and are interpreted alike. Central Sav. Bank in City of New York v. City of New York, 280 N.Y. 9 (1939); Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 280 N.Y. 194, 207 (1939). It is established that under such circumstances where the state constitutional provision which might be involved in a state action is a mirror of the federal constitutional provision at issue in the federal court, abstention by the federal court is inappropriate. Wisconsin v. Constantenau, 400 U.S. 433, 438-39 (1971); Reid v. Board of Education of the City of New York, 453 F.2d 238, 244 (2nd Cir. 1971); Stephens v. Tielsch, 502 F.2d 1360 (9th Cir. 1974); Donchoe Construction Company v. Maryland-National Capital Park

and Planning Commission, 398 F.Supp. 2i (M.D. 1975). This is particularly true in civil rights actions under §1983. Drexler v. Southwest Dubois School Corporation, 504 F.2d 836 839 (7th Cir. 1974).

#### CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

DATED: December 9, 1976

Respectfully submitted,

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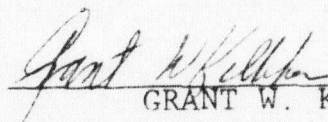
GRANT W. KELLEHER,  
MARK G. LEVINE,  
Of Counsel

#### CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of December, 1976, I served the foregoing Brief on counsel for the appellee and the Attorney General of the State of New York by causing copies to be mailed, postage prepaid to:

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GRANT W. KELLEHER

ANNEX 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
YVONNE GOULD, on her own behalf  
and on behalf of all others  
similarly situated,

Plaintiff,

-against-

MC CUE & MC CUE, P.C., ULSTER  
SAVING BANK and all other banking  
organizations similarly situated,

Defendants.  
-----x

:  
: MEMORANDUM AND ORDER

: 76 Civ. 1906  
:  
:

KNAPP, D. J.

This is an action challenging the constitutionality on due process grounds of New York's post-judgment garnishment statute (C.P.L.R. §5222) which authorizes an attorney for a judgment creditor to issue and serve, as an officer of the court, a restraining notice upon a third person holding property of the judgment debtor. Plaintiff, a welfare recipient, is a judgment debtor by virtue of a default judgment entered against her on December 12, 1975, in a civil action in the County Court of Orange County, entitled Orange County Trust Co. v. Yvonne Gould. On April 8, 1976, defendant McCue & McCue, acting on behalf of their client Orange County Trust Co. (the judgment creditor), served a restraining notice pursuant to C.P.L.R. §5222 on the defendant Ulster Savings Bank, at which bank plaintiff then maintained a checking account. As a result of that restraining notice, the bank dishonored checks written by the plaintiff on

her account. Plaintiff - on April 27, 1976 - commenced the instant action challenging the constitutionality of \$5222 on due process grounds. Two days later, having discovered that plaintiff was on welfare, defendant McCue & McCue lifted the restraining notice and on May 10, 1976 the bank released plaintiff's funds. On the same day, plaintiff closed her account and withdrew all her funds. She now has no account with that or any other bank.

As a result of the foregoing turn of events, defendant McCue & McCue has moved to dismiss the action as moot. Plaintiff's counsel has countered with motions to convene a three-judge court, for class action determination and for leave to cause other parties to intervene. Because we have determined that the case is moot, defendant's motion is granted and all of plaintiff's motions are denied.

In its papers in support of its motion to dismiss the action as moot, defendant McCue & McCue states that it "has taken no further steps against the plaintiff since lifting the restraining notice issued against the plaintiff's bank account, nor are any further steps contemplated while she is a recipient of public assistance". More importantly, plaintiff has indicated in her affidavit in opposition that she has "not established a checking account in any bank since the time of withdrawal of [her] funds from Ulster Savings Bank for fear that the funds in the account would be restrained to pay the judgment outstanding against [her]". This statement, when viewed

together with the defendant's intention not to proceed against plaintiff under §5222, establishes that this case is moot. Even if defendant resolved to pursue plaintiff via §5222 despite her status as a welfare recipient, she has deprived them of the means to do so, by virtue of her having closed her account. In other words, it is exclusively in plaintiff's control whether or not defendants can proceed against her under §5222, and she has elected to make that impossible. It is this factor which distinguishes the instant situation from that encountered in Moya v. DeBaca (D. N. Mex., 1968) (three judge court) 286 F.Supp. 606, app. disp., 395 U.S. 825. In that case, the defendant contended that the action - challenging the constitutionality of New Mexico's garnishment statute - was moot by virtue of his having discontinued garnishment proceeding brought by him against the plaintiff pursuant to the challenged statute. Since the defendant had earlier initiated those proceedings to enforce a money judgment against plaintiff in the wrong forum, the proceedings had been dismissed for lack of jurisdiction. The three judge court, however, declined to dismiss the constitutional action as moot, since the plaintiff was at any time "subject to garnishment in the proper jurisdiction". Moya v. DeBaca, supra, at 607. Unlike the instant situation, it was completely within the defendant's control in Moya, when, where and whether he was going to avail himself of the challenged state statute. In the instant case, on the other hand, it entirely

is up to plaintiff whether defendant will be able to avail itself of the procedures outlined in §5222. As things presently - and for the foreseeable future - stand, that does not appear likely or, indeed, possible. While the rule is well established that "voluntary cessation of allegedly illegal conduct"<sup>1/</sup> does not ordinarily make a case moot, the contrary is true when there is no "reasonable expectation that the wrong will be repeated"<sup>2/</sup> and nothing more than "a mere possibility"<sup>3/</sup> of recurrence exists.

We note en passant that in the event we had determined that the action was not moot, we (or any three judge court that might be convened) would most likely have abstained from adjudicating the merits, since it appears that §5222 is an "unconstrued state statute . . . susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem'". Bellotti v. Baird (7/1/76) \_\_\_\_\_ U.S. \_\_\_\_\_, 44 U.S.L.W. 5221, 5225, citing Harrison v. NAACP (1959) 360 U.S. 167, 177. See also Carey v. Sugar (3/24/76) \_\_\_\_\_ U.S. \_\_\_\_\_, 44 U.S.L.W. 4416, 4417. Although §5222 on its face does not itself make provision for pre-garnishment notice, the broad discretionary power vested in the court by C.P.L.R. §5240<sup>4/</sup> might be construed by the New York courts as sufficient to protect §5222 from constitutional objection. Moreover, if

the state courts should elect not to follow the course of construing the statute to make it conform to constitutional standards they might nonetheless eliminate any federal question by voiding the statute as violative of the state's own due process clause (N.Y.S. Const., Art. 1, §6). But be that as it may, we need not, in light of our holding on the mootness issue, reach the question of abstention, or, indeed, the question whether we or a three judge court must decide that question. See N.Y. State Waterways Assn., Inc. v. Diamond (2d Cir. 1972) 469 F.2d 419, 423, Abele v. Markle (2d Cir. 1971) 452 F.2d 1121, 1125, 1126 (and cases cited therein).

The case is, accordingly, dismissed as moot. Let judgment enter.

SO ORDERED.

Dated: New York, New York

August 4, 1976

S/ Whitman Knapp  
\_\_\_\_\_  
WHITMAN KNAPP, U.S.D.J.

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- 1/ United States v. W.T. Grant Co. (1953) 345 U.S. 629, 632.
  - 2/ Id., at 633.
  - 3/ See n. 2 above
  - 4/ "§5240. Modification or protective order; supervision of enforcement  
The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article. Amended L.1962, c.315, §5." (emphasis supplied)

## ANNEX 2

### § 5222. Restraining notice

(a) **Issuance; on whom served; form; service.** A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court. It may be served upon any person. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested. It shall specify all of the parties to the action, the date that the judgment was entered, the court in which it was entered, the amount of the judgment and the amount then due thereon, the names of all parties in whose favor and against whom the judgment was entered, and it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court.

(b) **Effect of restraint; prohibition of transfer; duration.** A judgment debtor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor is effective only if, at the time of service, he owes a debt to the judgment debtor or he is in the possession or custody of property in which he knows or has reason to believe the judgment debtor has an interest, or if the judgment creditor has stated in the notice that a specified debt is owed by the person served to the judgment debtor or that the judgment debtor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him, or until the judgment is satisfied or vacated, whichever event first occurs. A judgment creditor who has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor in an amount equal to twice the amount due on the judgment, the restraining notice is not effective as to other property or money.

(c) **Subsequent notice.** Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment. As amended L.1963, c. 544, § 1.